

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CECIL ROBY,

Plaintiff,

V.

CITY OF SPOKANE, WASHINGTON,
DANIEL WATERS, ANNE
KIRKPATRICK, RONALD VAN TASSEL,
JOHN GATELY, and DANIEL WILSON

Defendants.

No. CV-08 -139-JLQ

**MEMORANDUM OPINION AND
ORDER GRANTING CITY OF
SPOKANE DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

On July 17, 2009, the court heard oral argument on the City Defendants' (City of Spokane, Daniel Waters, Anne Kirkpatrick, Ronald Van Tassel, and John Gately) Motion for Dismissal/Summary Judgment (Ct. Rec. 33). Richard Wall appeared on behalf of the Plaintiff. Ellen O'Hara appeared for the City Defendants. Timothy Cronin appeared on behalf of Defendant Wilson. The court took the motions under advisement. The Motion for Dismissal/Summary Judgment seeks dismissal of the Plaintiff's First, Second, Third, Fourth, and Sixth causes of action pursuant to Fed. R. Civ. P. 12 and 56. Plaintiff has conceded he possesses insufficient evidence to sustain any claims against Defendants Van Tassel and Kirkpatrick. Ct. Rec. 65, 20:2-14.

1. Factual Background

In the early morning hours of March 17, 2007, Plaintiff Cecil Roby (“Roby”), his wife Catherine, and some friends were walking towards the corner of Division Street and Spokane Falls Boulevard when Mr. Roby claims he grabbed his wife and pulled her back

1 onto the sidewalk as she had dangerously begun to cross Division Street without looking
2 to ascertain oncoming traffic. At this time, Mr. Roby claims Defendant Daniel Wilson
3 ("Wilson"), a stranger and an off-duty Spokane firefighter in an allegedly intoxicated
4 state, struck him on the head as he was turning around, saying something to the effect of
5 "[d]on't ever hit your wife." Mr. Roby was knocked to the street. He and his witnesses
6 claim Defendant Wilson continued to strike him forcefully with his closed fist and/or a
7 small weapon. Mr. Roby claims he never struck Defendant Wilson or provoked the
8 attack.

9 One of Mr. Roby's friends separated the two men and helped Mr. Roby retreat
10 from Wilson. Mr. Roby was bleeding from his nose and face. His shirt was soaked in
11 blood as he attempted to staunch the flow. Officers Waters and Gately, Spokane
12 policemen, observed Defendant Wilson being pushed away by Mr. Roby's friends and
13 subsequently began to question witnesses. Officers Gately and Waters claim they
14 overheard Mrs. Roby saying "[h]e didn't hit me, he just pushed me." Defendant Wilson
15 told police that he saw Plaintiff push his wife, and tell her "[y]ou made a mistake
16 tonight." Defendants Gately and Waters claim Mrs. Roby, who also appeared
17 intoxicated, demonstrated how Mr. Roby pushed her by pushing the shoulder of one of
18 the officers.

19 Defendant Wilson claimed to the police officers that he told Mr. Roby to stop
20 pushing his wife, that Mr. Roby then threw a punch at him, but missed, and that he,
21 Defendant Wilson, then struck Mr. Roby a single time in the face. Officers Gately and
22 Waters claim they did not then know Defendant Wilson and were unaware of his
23 occupation as a Spokane fireman, but noted that he appeared to be intoxicated. The
24 officers claim they first learned that Wilson was a Spokane fireman when they asked for
25 his identification, but they claim that the nature of Wilson's employment played no role in
26 their decision to arrest Roby, but not Wilson.

27 A friend of Mr. Roby's, Howard Brutschy, told one of the Spokane policemen that
28 Defendant Wilson punched Mr. Roby multiple times with his closed fist, and that there

1 could have been an object in Defendant Wilson's hand as he was striking Mr. Roby.
2 Officer Gately claims Mr. Brutschy changed his story several times, saying one time that
3 he saw nothing, then that he saw Defendant Wilson hit Mr. Roby with a billy club, and
4 then that he saw just one punch. Another friend of Mr. Roby's, Steven Donahue, claims
5 Defendant Wilson struck Mr. Roby fifteen or twenty times, and that he told this to a
6 Spokane policeman at the scene.

7 Mr. Roby's wife states she repeatedly told Officer Waters that her husband did not
8 hit her, and demonstrated to him how Mr. Roby had pulled her back onto the sidewalk.
9 Mrs. Roby never told any officer that she was harmed or offended in any manner.
10 Officer Gately claims that Mrs. Roby continually described the contact her husband made
11 with her as a "push."

12 Mr. Roby states that he was immediately informed that he was going to be
13 arrested for domestic violence assault. Defendant Gately claims Mr. Roby angrily told
14 his wife that "[t]his was all her fault." Mr. Roby claims he was not asked or allowed to
15 tell his side of the story to the police officers and that he observed a number of Spokane
16 police officers standing and laughing with Defendant Wilson. Mr. Roby claims the
17 officers were very aggressive towards him, telling him it was "clear" that there was
18 probable cause to arrest him for domestic violence assault.

19 Mr. Roby claims Defendants Gately and Waters made no attempt to document or
20 determine the extent of his injuries other than to note that his face was bleeding. Mr.
21 Roby was taken to a hospital for treatment, then taken to jail and arrested. Mr. Roby
22 claims that prior to being taken to jail Officer Gately told him Defendant Wilson struck
23 him only one time, Mr. Roby's and other witnesses assertions that he was struck multiple
24 times notwithstanding. Officer Gately stated that Mr. Roby was argumentative and
25 appeared highly intoxicated. At jail, Mr. Roby claims he asked the officers to place his
26 blood-soaked shirt in an evidence bag untouched. Mr. Roby states that the shirt was later
27 returned to him, washed of all traces of blood.

1 Mr. Roby claims he sustained severe injuries, including 20% hearing loss as a
2 result of the attack and that the nature and extent of his injuries suggest he was probably
3 struck many times by a closed fist, or at least twice with a weapon. Mr. Roby claims
4 that Spokane police and firefighters have frequent contact during the course of
5 performing their duties, and that Officer Waters knows a number of firefighters
6 personally.

7 Officers Gately and Waters claim that Mr. Roby's arrest was based on their
8 determination that he was the primary aggressor in the incident with his wife, including
9 his demeanor and statements to his wife and the statements of other witnesses. They
10 claim that Mr. Roby's fight with Defendant Wilson played "zero role" in their
11 determination to arrest Mr. Roby. The police officers claim their decision not to arrest
12 Defendant Wilson was based on Officers Gately and Waters' determination that his claim
13 of self-defense was credible.

14 In his Complaint against the City Defendants (Ct. Rec. 1), Plaintiff has alleged 1) a
15 violation of his constitutional right not to be subject to arrest without probable cause; 2) a
16 state law claim for false arrest and imprisonment; 3) a violation of his constitutional due
17 process rights through arbitrary and capricious government action; 4) a constitutional
18 violation by Defendant Anne Kirkpatrick, Spokane Police Chief, for failure to adequately
19 train and supervise Spokane Police Officers; 5) a state law assault and battery claim
20 against Defendant Daniel Wilson; and 6) a claim of *respondeat superior* liability against
21 the City of Spokane on all federal and state claims.

22 **2. Standard of Review**

23 The City Defendants filed their Motion For Dismissal pursuant to Fed. R. Civ. P.
24 12(b)(6) and 12(c), or, in the alternative, for Summary Judgment pursuant to Fed. R. Civ.
25 P. 56. Plaintiff has withdrawn all claims against Defendants Van Tassel and Kirkpatrick.
26 His allegations against the remaining Defendants, accepted as true as required, state a
27 claim upon which relief can be granted and are sufficient to defeat the Motion For
28 Dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Pursuant to Fed. R. Civ. P. 12©, and as

1 requested by the City Defendants, the Motion To Dismiss is converted to a Motion for
 2 Summary Judgment pursuant to Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(d); *U.S. v.*
 3 *Duffy*, 550 F.2d 533, 534 n. 2 (9th Cir. 1977)(“The government filed a motion for
 4 judgment on the pleadings, Rule 12©, Fed.R.Civ.P., which the trial court, considering
 5 both the pleadings and the affidavits filed by each party, properly treated as a motion for
 6 summary judgment”).

7 Summary judgment is appropriate only when there “is no genuine issue as to any
 8 material fact and...the moving party is entitled to judgment as a matter of law.” Fed. R.
 9 Civ. P. 56©. A genuine issue of material fact exists when there is “sufficient evidence
 10 favoring the non-moving party for a jury to return a verdict for that party.” *Anderson v.*
 11 *Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). The moving party bears the initial
 12 responsibility of informing the court of the basis for its motion and identifying those
 13 portions of the record that establish the absence of a genuine issue of material fact.
 14 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its
 15 burden, the non-moving party must go beyond the pleadings and come forward with
 16 specific facts to demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).
 17 The non-movant must, however, do more than show that there is some abstract doubt as
 18 to the material facts. He must present significant probative evidence in support of his
 19 opposition to the Motion For Summary Judgment in order to defeat the Motion.
 20 *Anderson*, 477 U.S. at 248.

21 3. Discussion

22 A. *De Facto* Policy Within Spokane Police Department

23 City Defendants first move for summary judgment of dismissal of all claims based
 24 on Mr. Roby’s claim of an alleged *de facto* policy of favoritism by Spokane Policemen.
 25 Ct. Rec. 35, 7:23-25. In his Complaint, Mr. Roby makes the following assertion:

26 *On information and belief*, the officer’s failure to arrest or charge defendant
 27 Wilson and the arrest and charging of Plaintiff was done as part of a *de facto* policy
 28 within the Spokane Police Department of giving preferential treatment to
 firefighters employed by the City of Spokane. Plaintiff was arrested and charged
 with domestic violence solely for the purpose of protecting defendant Wilson from
 Criminal or civil liability for the assault on Plaintiff. Further, defendants Gately,

1 Waters and Van Tassel prepared and filed sworn reports concerning the incident
 2 that contained statements that the officers knew to be false. The filing of such
 3 reports containing false statements was also done for the purpose of protecting
 defendants [sic] Wilson and to protect the officers from and [sic] charges of
 misconduct.

4 Ct. Rec. 1, ¶ 13.

5 The allegation of an alleged favoritism policy is not a cause of action in and of
 6 itself; rather it constitutes circumstantial evidence Mr. Roby is using to try to prove lack
 7 of probable cause for his arrest and ulterior motivations on the part of the arresting
 8 officers for his arrest, but not Wilson. While Mr. Roby submits no direct evidence of the
 9 existence of such a policy, he does offer circumstantial evidence of favoritism in this
 10 specific case, such as his statement that he observed his arresting officers laughing with
 11 Defendant Wilson (Ct. Rec. 70, ¶ 6), and that Roby was the only party arrested despite
 12 his obvious and extensive physical injuries (*Id.*). However, the Plaintiff has voluntarily
 13 dismissed his claim of the existence of an ongoing policy of favoritism and has limited
 14 his claim to his specific circumstances including a claim that Defendant Wilson's City of
 15 Spokane employment as a firefighter triggered Roby's arrest for alleged domestic
 16 violence in an alleged effort by the police officers to protect Wilson from any Roby claim
 17 of assault.

18 **B. Fourth Amendment Violation - Unlawful Arrest**

19 Mr. Roby's First cause of action is a 28 U.S.C. § 1983 claim asserting that his
 20 Fourth Amendment right to be free from unlawful arrest was violated. "To state a section
 21 1983 claim, a plaintiff must allege facts which show a deprivation of a right, privilege or
 22 immunity secured by the Constitution or federal law by a person acting under color of
 23 state law." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

24 It is undisputed that all City Defendants were acting under the color of state law at
 25 the time of the incident in question. Thus, the remaining question is whether the arresting
 26 officers violated Mr. Roby's constitutional right to be free from unlawful arrest.
 27 "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy
 28 information sufficient to lead a person of reasonable caution to believe that an offense has

1 been or is being committed by the person being arrested.” *Rodis v. City of San*
 2 *Francisco*, 558 F.3d 964, 969 (9th Cir. 2009)(citations omitted). While conclusive
 3 evidence of guilt is not necessary to establish probable cause, “[m]ere suspicion, common
 4 rumor, or even strong reason to suspect are not enough.” *Ramirez v. City of Buena Park*,
 5 560 F.3d 1012, 1023 (9th Cir. 2009)(citations omitted).

6 Mr. Roby was arrested for domestic violence fourth degree assault, which has as
 7 elements 1) an assault, 2) not amounting to assault in the first, second, or third degree.
 8 RCW 9A.36.041. Three definitions of criminal assault have been recognized in
 9 Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2)
 10 an unlawful touching with criminal intent; and (3) putting another in apprehension of
 11 harm whether or not the actor intends to inflict or is incapable of inflicting that harm.
 12 *State v. Krup*, 36 Wn.App. 454, 458-460 (1984). Additionally, intent is a court-implied
 13 element of assault in the fourth degree. *State v. Walden*, 67 Wn.App. 891, 894 (1992).
 14 “A touching may be unlawful because it was neither legally consented to nor otherwise
 15 privileged, and was either harmful or offensive.” *State v. Garcia*, 20 Wn.App. 401, 403
 16 (1978). Further, as established by, *inter alia*, the affidavit of Chief of Police Anne
 17 Kirkpatrick and Officer John Gately, the law of the state of Washington, R.C.W.
 18 10.99.030, provides in part that “When a peace officer responds to a domestic violence
 19 call and has probable cause to believe that a crime has been committed, the peace officer
 20 shall exercise arrest powers.” There is no showing by the Plaintiff that the mandate of
 21 this statute was not followed by Spokane Police Officers on an ongoing basis.

22 The court finds that the undisputed evidence establishes that Defendants Gately
 23 and Waters had probable cause to arrest Mr. Roby for fourth degree assault. Thus, he
 24 was not deprived of his Fourth Amendment right to be free from unlawful arrest.
 25 Evidence sufficient to establish probable cause at the scene need not be sufficient to
 26 sustain a conviction pursuant to *Ramirez*. The evidence the officers relied upon to arrest
 27 Mr. Roby would lead a reasonable person to believe domestic violence assault had been
 28 committed. Officer Gately heard Mrs. Roby say to Defendant Wilson that “[h]e didn’t hit

1 me, he just pushed me.” Ct. Rec. 39, ¶ 7. Mrs. Roby told Officer Gately directly that
 2 “[m]y husband did not hit me, he just pushed me.” Ct. Rec. 39, ¶ 8. Mrs. Roby
 3 demonstrated the contact to Officer Gately by pushing his shoulder. *Id.* Defendant
 4 Wilson, a witness to the event, told Officer Gately that Mr. Roby pushed his wife, telling
 5 her that she “made a mistake tonight.” Ct. Rec. 39, ¶ 10. Officer Gately talked to Mrs.
 6 Roby further, and she reiterated that Mr. Roby pushed her, though maintaining that he did
 7 not hit her. Ct. Rec. 39, ¶ 9. Both Mr. and Mrs. Roby appeared to Officer Gately to be
 8 intoxicated. Ct. Rec. 39, ¶ 8; ¶ 16. Officers Waters and Gately observed Mr. Roby walk
 9 up to Mrs. Roby and say “[t]his is all your fault,” causing her to cry. Ct. Rec. 40, ¶ 15;
 10 Ct. Rec. 39, ¶ 12. Both Officers Gately and Waters concluded that Mr. Roby’s demeanor
 11 was aggressive, and that he was angry at his wife. Ct. Rec. 40, ¶ 19; Ct. Rec. 39, ¶ 20.

12 All of the foregoing evidence, even when construed in a light most favorable to
 13 Mr. Roby, indicates that the officers in question had probable cause to believe that Mr.
 14 Roby had unlawfully touched his wife and/or placed her in apprehension of harm. It is
 15 undisputed that he made some form of physical contact with her, and Mr. Roby yelled at
 16 his wife on more than one occasion. Furthermore, Mr. Roby was intoxicated. A
 17 reasonable person could take the connotation of the word “push,” which Mrs. Roby used
 18 to describe what her husband did to her, to mean some form of aggressive, unwanted
 19 contact, particularly when the contact is initiated by a male involving a female victim.

20 Mr. Roby’s best argument on his claim of lack of probable cause revolves around
 21 the specific intent element of assault. “[W]hen specific intent is a required element of the
 22 offense, the arresting officer must have probable cause for that element in order to
 23 reasonably believe that a crime has occurred.” *Gasho v. United States*, 39 F.3d 1420,
 24 1428 (9th Cir. 1994). Mrs. Roby told the police that her husband did not hit her, and that
 25 he only pulled her back, maintaining that the police did not seem interested in her story.
 26 Ct. Rec. 69, ¶ 6. Mrs. Roby was neither hurt nor offended by Mr. Roby’s actions, and
 27 she conveyed this to the police. Ct. Rec. 69, ¶ 7. Mr. Roby contends that the only other
 28 witness to the alleged assault was Defendant Wilson, who was intoxicated and had just

1 beaten him severely, therefore imputing a motive to allege that Mr. Roby assaulted his
2 wife. Ct. Rec. 65, 13:20-28.

3 Mr. Roby's argument fails for several reasons. First, assault can be a mere
4 apprehension of harm. *Krup, supra*. Even if Defendant Wilson was the only witness to
5 observe physical contact between Mr. and Mrs. Roby, Officers Gately and Waters
6 observed Mr. Roby yelling at his wife, his intoxicated state, and Mrs. Roby's
7 demonstration of physical contact by Mr. Roby. All of these factors combined
8 to create a situation in which a reasonable person could conclude probable cause existed
9 to arrest Mr. Roby for domestic violence assault. Secondly, the Officers could have
10 reasonably inferred specific intent from the totality of the evidence. Mrs. Roby
11 maintained that she was never harmed or offended, but this does not categorically prove
12 that Mr. Roby never, at any point, harbored such intent. Again, Mr. Roby's intoxication,
13 his contact with his wife, and his yelling at her in an aggressive manner ("This is all your
14 fault;" "You made a big mistake") could lead an officer to reasonably conclude that Mr.
15 Roby had assaulted his wife with the requisite specific intent.

16 Mr. Roby's arguments are all ones that might help prove himself innocent of the
17 charges at trial (the charges against him were dropped), but the court does not find them
18 persuasive in the context of a probable cause analysis. Pursuant to *Ramirez*, Officers
19 Gately and Waters did not need proof of guilt, but rather were required to meet the lower
20 standard of probable cause under the Washington domestic violence statute. Police
21 officers are required to make decisions based on the facts available to them at the scene in
22 a particular, possibly heated moment in time, and the foregoing evidence is sufficient to
23 show Officers Gately and Waters had probable cause to arrest Mr. Roby. Accordingly,
24 Mr. Roby has not established that he was denied his Fourth Amendment right to be free
25 from unlawful arrest, and the City Defendants' Motion for Summary Judgment is
26 **GRANTED** with respect to Mr. Roby's First cause of action.

1 Giving the Plaintiff the benefit of all reasonable inferences from the facts presented
2 the court concludes that probable cause to arrest Mr. Roby existed. The failure of the
3 officers to arrest Mr. Wilson under circumstances which Plaintiff's evidence would
4 arguably establish probable cause for Wilson's arrest does not create an independent
5 cause of action in favor of Roby. Clearly the failure to arrest a third party cannot
6 constitute a civil rights violation. It is not disputed that Defendant Wilson struck Roby at
7 least once, and the evidence of Roby's severe injuries suggests he was struck more than
8 once or with a weapon. Defendant Wilson was never arrested, or even issued a citation,
9 let alone detained in any form or fashion. The City Defendants in their affidavits and
10 briefs have reacted in an exaggerated manner to Mr. Roby's suggestions of a *de facto*
11 policy of favoritism. Events such as this could create and perpetuate a public mistrust of
12 law enforcement conduct in dealing with their fellow employees, be they firefighters or
13 policemen who may have committed offenses. Lay citizens, if they had themselves acted
14 in the manner of Defendant Wilson and Roby, would, more likely than not, expect the
15 police to arrest both of them, or at a minimum, issue a citation to both parties, not just
16 arrest one party to such a confrontation. Counsel for the Defendants has recognized the
17 problem of the public perception as set forth in the Motion In Limine (C.R. 81 ¶s 3 & 4)
18 seeking to preclude reference to "other police cases in Spokane," or "references to other
19 cases against the City of Spokane" based upon allegations of police misconduct or
20 failures.

21 The foregoing being said, the court recognizes the difficult, sometimes split
22 second decisions police officers in Spokane must make. Police officers must make those
23 difficult decisions based upon the circumstances existing on the street, rather than after
24 extensive review and post judgment by lawyers and judges based upon hours of review of
25 legal authorities and briefs. However, favoritism, actual or implied, by police in any
26 manner to fellow City employees, particularly to those also involved in public safety,
27 could cause the citizenry to lose confidence in the good faith of its police officers. In this
28 case, however, the evidence submitted to the court does not establish that the Roby arrest

1 decision of the officers investigating the drunken Roby/Wilson confrontation were solely
2 and proximately based upon favoritism to Wilson.

3 **C. State Law - False Arrest/Imprisonment**

4 The City Defendants next move for Summary Judgment as to Mr. Roby's Second
5 cause of action that he was wrongly and without legal justification restrained by the use
6 of physical force and/or the threat thereof. Ct. Rec. 1, ¶ 18.

7 Under Washington law, probable cause for arrest is a complete defense to an action
8 for false arrest and imprisonment. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563
9 (1993). For the reasons stated *supra*, probable cause existed to arrest Mr. Roby for fourth
10 degree assault domestic violence, and this finding is an absolute bar to his claim of false
11 imprisonment. Accordingly, the City Defendants' Motion for Summary Judgment is also
12 **GRANTED** with respect to Mr. Roby's Second cause of action.

13 **D. Due Process Violation**

14 Mr. Roby's Third cause of action alleges his constitutional due process rights
15 were violated by the City Defendants' alleged arbitrary and capricious conduct in failing
16 to arrest Wilson. Ct. Rec. 1, ¶ 19. The non-arrest of Defendant Wilson has been
17 discussed, *supra*, however, Mr. Roby does not have a federal constitutional or state
18 recognized right to require the police to arrest a third party. For the reasons stated
19 probable cause existed to arrest Mr. Roby for fourth degree assault domestic violence,
20 and the existence of probable cause for his arrest necessarily renders his arrest non-
21 arbitrary or capricious. The non-arrest of Defendant Wilson does not change the fact that
22 probable cause existed for the arrest of Mr. Roby. Accordingly, the City Defendants'
23 Motion for Summary Judgment is **GRANTED** with respect to Mr. Roby's Third cause of
24 action.

25 **E. Failure to Train**

26 Mr. Roby's Fourth cause of action alleges that Defendant Anne Kirkpatrick, Chief
27 of the Spokane Police, failed to adequately train or supervise officers of the Spokane
28 Police Department. Ct. Rec. 1, ¶ 20. Mr. Roby has admitted he has insufficient evidence

1 to sustain this claim. Ct. Rec. 65, 20:10-14. The City Defendants' Motion for Summary
 2 Judgment is also **GRANTED** with respect to Mr. Roby's Fourth cause of action.

3 **F. State Law - *Respondeat Superior***

4 Mr. Roby's Sixth and final cause of action alleges that the City of Spokane is liable
 5 based on the acts or omissions taken by its representatives, agents, or employees. Ct.
 6 Rec. 1, ¶ 22. Given the court's finding of the existence of probable cause for Mr. Roby's
 7 arrest, the only possible *respondeat superior* claim rests on Mr. Roby's Fifth cause of
 8 action, his assault claim against Defendant Wilson.

9 Under the doctrine of *respondeat superior*, an employer may be liable for its
 10 employee's negligence in causing injuries to third persons if the employee was within the
 11 "scope of employment" at the time of the occurrence. *Breedlove v. Stout*, 104 Wn.App.
 12 67, 69 (2001). The test for determining if an employee is acting in the scope of
 13 employment is "whether the employee was, at the time, engaged in the performance of
 14 the duties required of him by his contract of employment, or by specific direction of his
 15 employer." *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573 (1958). While
 16 determining the scope of employment is normally a jury question, where there can be
 17 only one reasonable inference from the undisputed facts, the issue may be resolved at
 18 summary judgment. *Breedlove*, 104 Wn.App. at 70 n. 5.

19 Nowhere in the pleadings has Mr. Roby alleged that Defendant Wilson was acting
 20 within the scope of his employment when the alleged assault occurred. The record
 21 indicates that Defendant Wilson, though employed by the City of Spokane as a
 22 firefighter, was not on duty or acting within the scope of his employment at the time of
 23 the incident. Accordingly, the City Defendants' Motion for Summary Judgment
 24 regarding Mr. Roby's Sixth cause of action is **GRANTED**.

25 **G. Qualified Immunity**

26 The City Defendants also move for summary judgment on all claims remaining
 27 against Officers Gately and Waters, arguing that they are entitled to qualified immunity.
 28 Ct. Rec. 35, 9:21-13:1. The court does not reach the merits of this defense, as qualified

1 immunity analysis is unnecessary since there is no finding of the deprivation of Mr.
2 Roby's constitutional rights.

3 **IT IS HEREBY ORDERED:**

4 1. The City Defendants' Motion for Dismissal/Summary Judgment (Ct. Rec. 33) is
5 **GRANTED.**

6 2. Without specific court authorization, no reference shall be made in any
7 subsequent trial of the Roby claim against Wilson regarding the City of Spokane or City
8 Defendants prior status as Defendants in this case.

9 3. Without specific court authorization, no reference shall be made in any
10 subsequent trial of the Roby claim against Wilson regarding the fact that any party was or
11 was not arrested, or any speculation regarding the reasons for such action or lack thereof.

12 4. All claims against the City Defendants having been dismissed, those parties are
13 released from further filings in this court.

14 The Clerk is hereby directed to enter this Order, enter judgment of dismissal with
15 prejudice in favor of Defendants Gately, Waters, Van Tassel, Kirkpatrick and the City of
16 Spokane dismissing the Complaint and Claims One, Two, Three, Four, and Six of the
17 Complaint with prejudice and furnish copies to counsel.

18 **DATED** this 17th day of August, 2009.

19 s/ Justin L. Quackenbush
20 JUSTIN L. QUACKENBUSH
21 SENIOR UNITED STATES DISTRICT JUDGE